A **THE CO-OPERATIVE CENTRAL BANK LTD**

v.

KGV & ASSOCIATES SDN BHD

B FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF CJ (MALAYA)
ARIFIN ZAKARIA FCJ
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-7-2007(W)]
C 28 NOVEMBER 2007

TORT: *Negligence - Negligent misstatement - Valuation report by property valuer to third party - Bank claimed it relied on report to grant loan to borrower who defaulted - Whether valuer had knowledge that*
D *report was to be relied by bank - Whether valuer owed duty of care to persons unknown*

TORT: *Negligence - Duty of care - Negligent misstatement - Professional advisor to third party in claim for pure economic loss*

E ***BANKING:*** *Securities for advances - Security valued much higher than actual value in valuation report - Valuation report commissioned by third party and not by bank or borrower - Whether bank could claim pure economic loss*

F This was an appeal by the appellant bank against the respondent company, a property valuer, for negligence. The facts showed that one Lim Tian Huat ('Lim') sought the assistance of his friend one Kong Siew Ken ('Kong') to secure a loan from the appellant to set up a marble factory. Kong applied for the loan in his name
G and offered Lim's property as security. Kong instructed one Tan Liew Lin ('Tan'), a friend of both Kong and Lim, to commission a valuation report ('the report') from the respondent. The respondent's valuer was shown the property by both Tan and Lim which appeared to be three units of shop-lots which were 70%
H completed. The respondent's valuer then issued the report dated 21 January 1985 at RM408,000 with a forced sale value at RM325,000. The appellant issued an offer for the loan to Kong on 17 October 1985 but Kong did not accept the offer and the appellant cancelled it. The appellant issued a subsequent offer on
I 2 April 1986 that was accepted by Kong. Kong, however, defaulted on the loan and the appellant, for the purpose of foreclosure proceedings commissioned a valuation from another

valuer of the property. The second valuation disclosed the property was in fact vacant land with a forced sale value of only RM51,000. The appellant sued the respondent for negligence and the High Court judge found for the appellant. The respondent appealed to the Court of Appeal. The Court of Appeal held in favour of the respondent. Hence, the appellant's appeal.

Held (dismissing the appeal)
Per Alauddin Mohd Sheriff CJ (Malaya) delivering the judgment of the court:

(1) The report was addressed to Tan and not to the appellant. Further, Tan was not the owner of the property. The owner was Lim. The borrower was Kong who wanted the loan and had asked Tan to obtain the report from the respondent. Clearly, there were three levels of individuals between the respondent and the appellant, *ie*, Tan who was asked to procure the valuation, Lim the landowner who provided his title as security and Kong the beneficiary of the loan. (para 32)

(2) Lim and Tan took the respondent's valuer to the site and identified the property to him. It was clear that Tan and Lim identified a property that did not belong to them. They identified three units of substantially completed shophouses, when in fact (as it subsequently transpired) the land was vacant and there was no construction on it. That was significant because if there was any duty owed to Tan, Lim or Kong, it was discharged by valuing the property identified by them. Clearly there was no breach to Tan, Lim or Kong. (para 32)

(3) The fact remained that the report was addressed to Tan. The evidence of the appellant's expert witness that in practice the report was confidential to the addressee was relevant. (para 32)

(4) It was confirmed by one of the appellant's officer that there was no communication between the appellant and the respondent until 10 August 1990. That officer could not even confirm whether the valuation report was in the loan application file or how it came to be in the appellant's hands. Although that was contradicted by another officer of the

A appellant who testified that there was communication, his evidence was hearsay and inadmissible. Therefore, it was unclear whether there was any reliance on the report. (para 32)

B **(5)** The letters of offer by the appellant did not require a valuation report to be produced. In fact, they required the appellant to satisfy itself of the progress of the construction. Also, the appellant did in fact carry out its inspection at the site and confirmed that the said buildings were 100% C completed before disbursing the loan. (para 32)

(6) The original letter of offer that was cancelled was issued on 17 October 1985. When the subsequent offer was issued on 2 April 1986, the report issued on 21 January 1985 was one D year three months old. A valuer called as an expert witness by the appellant testified that it was unreasonable for the appellant to have relied on a report that was more than one-year old. Further, the report carried a disclaimer under the heading "Limiting Conditions". The appellant's expert witness E also testified that the industry practice required strict adherence to those conditions. (para 32)

(7) There was no evidence to suggest that the respondent knew or ought to have known that the report was to be used or relied on by the appellant. The appellant did not in fact rely F on the valuation report in granting the loan to Kong. In *Smith v. Eric Bush* it was held that the professional, ought not, on policy grounds owe a duty to persons unknown. This court appreciated that the Court of Appeal acted precisely on the same tests adopted by the Federal Court in *Majlis Perbandaran* G *Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. The Court of Appeal basically held the view that each case must be decided on its particular facts to establish if a duty of care existed. (paras 33 & 35)

H ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh bank perayu terhadap syarikat responden, sebuah syarikat penilai hartanah, kerana kecuaian. Fakta menunjukkan bahawa seorang Lim Tian Huat ('Lim') telah I meminta bantuan kawannya, seorang Kong Siew Ken ('Kong'), bagi mendapatkan pinjaman dari perayu untuk tujuan membina sebuah kilang batu marmar. Kong memohon pinjaman atas

namanya dan menawarkan hartanah milik Lim sebagai jaminan. Kong juga mengarahkan seorang Tan Liew Lin ('Tan'), yang merupakan kawan kepada kedua mereka, bagi mendapatkan laporan penilaian ('laporan') dari responden. Tan dan Lim kemudian menunjukkan hartanah, iaitu tiga unit rumah kedai yang 70% siap, kepada penilai responden. Berikutnya, penilai responden telah mengeluarkan laporan bertarikh 21 Januari 1985 menilai hartanah pada kadar RM408,000 dengan RM325,000 sebagai nilai jualan paksa. Pada 17 Oktober 1985 perayu membuat tawaran pinjaman kepada Kong tetapi Kong tidak menerimanya dan tawaran dibatalkan oleh perayu. Pada 2 April 1986 perayu membuat tawaran baru dan tawaran diterima oleh Kong. Kong, bagaimanapun, ingkar dalam pembayaran balik, dan bagi maksud prosiding halang tebus, perayu mendapatkan penilaian dari seorang penilai hartanah yang lain. Penilaian kedua telah mendedahkan bahawa hartanah sebenarnya hanyalah sebidang tanah kosong dengan nilai jualan paksa bernilai RM51,000 sahaja. Perayu mendakwa responden kerana kecuaian dan hakim Mahkamah Tinggi memutuskan untuk perayu. Responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan memutuskan dengan berpihak kepada responden, dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Alauddin Mohd Sheriff HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Laporan ditujukan kepada Tan dan bukannya kepada perayu. Selain itu, Tan bukanlah tuan punya hartanah. Pemiliknya adalah Lim. Peminjamnya pula adalah Kong yang berkehendak kepada pinjaman dan meminta Tan untuk mendapatkan laporan dari responden. Jelas bahawa terdapat tiga peringkat individu di antara responden dan perayu, iaitu Tan yang diminta untuk mendapatkan laporan, pemilik tanah Lim yang memberikan hakmiliknya sebagai jaminan dan Kong sebagai benefisiari pinjaman.

(2) Lim dan Tan telah membawa penilai responden ke tapak dan mengenal pasti hartanah kepadanya. Adalah jelas bahawa Tan dan Lim telah mengenal pasti hartanah di mana mereka bukanlah pemiliknya. Mereka mengenal pasti tiga unit rumah kedai yang hampir siap, sedangkan pada hakikatnya (seperti yang terdedah kemudian) tanah adalah tanah kosong tanpa apa-apa pembinaan di atasnya. Ini penting kerana, jika wujud

A apa-apa tanggungjawab ditanggung oleh Tan, Lim atau Kong, ia telah dilaksanakan dengan penilaian hartanah yang dikenal pasti oleh mereka. Jelasnya tiada kemungkiran oleh Tan, Lim atau Kong.

B **(3)** Faktanya masih lagi bahawa laporan adalah ditujukan kepada Tan. Keterangan saksi pakar perayu bahawa laporan secara amalinya adalah rahsia dan khusus untuk orang yang dimaksudkan sahaja adalah relevan.

C **(4)** Salah seorang dari pegawai perayu telah mengesahkan bahawa tidak terdapat apa-apa komunikasi di antara perayu dan responden sehinggalah 10 Ogos 1990. Pegawai tersebut bagaimanapun tidak dapat mengesahkan sama ada laporan penilaian berada di dalam fail permohonan pinjaman atau bagaimana ia berada di tangan perayu. Walaupun ini D bertentangan dengan kesaksian seorang lagi pegawai perayu yang menyatakan wujud komunikasi, keterangannya adalah keterangan dengar cakap dan tidak boleh diterima-masuk. Oleh itu, tidak jelas sama ada terdapat pergantungan kepada laporan. E

(5) Surat-surat tawaran perayu tidak memerlukan supaya laporan penilaian dikemukakan. Surat-surat malah menuntut supaya perayu sendiri memuaskan hatinya mengenai progres pembinaan. Selain itu, perayu telah membuat pemeriksaan di F tapak dan mengesahkan bahawa bangunan-bangunan tersebut telah 100% siap sebelum mengeluarkan pinjaman.

(6) Surat tawaran asal yang dibatalkan telah dikeluarkan pada 17 Oktober 1985. Apabila tawaran berikutnya dibuat pada 2 G April 1986, laporan yang dikeluarkan pada 21 Januari 1985 sudah setahun tiga bulan dikeluarkan. Seorang penilai yang dipanggil sebagai saksi pakar oleh perayu menyatakan bahawa adalah tidak munasabah bagi perayu untuk bergantung kepada laporan yang dibuat lebih setahun yang lalu. Selain itu, H terdapat 'disclaimer' pada laporan di bawah tajuk "Limiting Conditions". Saksi pakar perayu juga menyatakan bahawa amalan-amalan dalam industri menuntut kepatuhan yang ketat terhadap syarat-syarat berkenaan.

I **(7)** Tiada keterangan yang menunjukkan bahawa responden mengetahui atau sepatutnya mengetahui bahawa laporan akan digunakan atau dijadikan pergantungan oleh perayu. Malah, perayu pada hakikatnya tidak bergantung kepada laporan

apabila memberikan pinjaman kepada Kong. Di dalam *Smith v Eric Bush* ianya diputuskan bahawa golongan profesional tidak sepatutnya, atas dasar polisi, memikul tanggungjawab terhadap orang yang tidak dikenali. Mahkamah ini akur bahawa Mahkamah Rayuan telah bertindak atas ujian-ujian yang sama seperti yang dipakai oleh Mahkamah Persekutuan di dalam *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. Mahkamah Rayuan pada dasarnya memutuskan bahawa, dalam menentukan sama ada tanggungjawab untuk berhati-hati wujud ataupun tidak, setiap kes hendaklah diputuskan menurut fakta-faktanya yang tersendiri.

Case(s) referred to:

Caparo Industries PLC v. Dickman [1990] 2 AC 605 ***(refd)***

Her Majesty's Commissioners of Customs and Excise v. Barclays Bank plc [2006] UKHL 28 ***(refd)***

Her Majesty's Commissisoners of Customs and Excise v. Barclays Bank Plc [2006] 4 All ER 256 ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Man B & W Diesel SE Asia Ptd & Anor v. PT Bumi International Tankers & another appeal [2004] 2 SLR 300 ***(refd)***

RSP Architects Planners & Engineers v. Management Corporation Strata Title No. 1075 [1999] 2 SLR 449 ***(refd)***

RSP Architects Planners & Engineers v. Ocean Front Pte Ltd [1996] 1 SLR 113 ***(refd)***

Smith v. Eric Bush [1990] 1 AC 831 ***(refd)***

For the appellant - S Murthi; M/s S Murthi & Assoc

For the respondents - David Morais (Su-Ann Lim with him); M/s M David Morais

Reported by Usha Thiagarajah

JUDGMENT

Alauddin Mohd Sheriff CJ (Malaya):

[1] The records before us disclose the following facts. One Lim Tian Huat ("Lim") intended to take a loan from the appellant to set up a marble factory. Lim however had no prior business record which made it difficult for him to secure a loan. Lim approached his friend Kong Siew Ken ("Kong") for assistance in securing the loan. Kong applied for a loan from the appellant in

his own name and offered Lim's landed property as security. The property is described as HS(D) 9411, 9412 & 9414, PTD No. 4052, 4053 and 4055 in Mukim Paloh, District of Kluang, Johor ("the Property").

[2] Tan Liew Lin ("Tan") was a friend of both Kong and Lim. Kong instructed Tan to approach the respondent for a valuation of the Property.

[3] The respondent company is a property valuer. It's managing director, Ng Heng Cheong ("Ng") is a registered valuer. At the material time, the other registered valuer in the respondent's employ was one Long Tian Chek ("Long"). The respondent also employed an assistant at that time identified only as "Teo".

[4] Tan's initial contact was with Ng. The actual valuation was conducted by Long who was assisted by Teo. Teo was shown the Property by Tan and Lim, which appeared to be 3 units of shop-lots which were 70% completed. At that time the Property could not be identified by their titles. Relying on Tan and Lim's identification of the Property, Long issued a valuation report which was dated 21 January 1985 ("the Valuation Report").

[5] The appellant extended an offer for the loan to Kong on 17 October 1985. This offer was never accepted by Kong and was cancelled by the appellant. The appellant then issued a fresh offer to Kong on 2 April 1986. This was the offer which was accepted and led to the loan from the appellant to Kong.

[6] The appellant's own evidence is that it was unreasonable for the appellant to rely on the Valuation Report in issuing the second offer. Further, and this is also material to the appeal, the Valuation Report in any event contained an effective disclaimer of liability.

[7] The respondent valued the forced sale value of the Property at RM325,000. When Kong defaulted on the loan, the appellant commissioned a valuation from CH Williams, Talhar & Wong Sdn. Bhd. for the purpose of foreclosure proceedings ("the second Valuation"). This second valuation disclosed that the Property was in fact vacant land, with a forced sale value of only RM51,000.

[8] The appellant sued the respondent. The claim is founded on negligence. The appellant alleged that the respondent had negligently prepared the Valuation Report for the Property which was relied on by the appellant in granting the loan to Kong.

[9] The amount loaned to Kong to finance the purchase of the Property was RM100,000. Part of the consideration for the loan was a charge over the Property in favour of the appellant. The appellant alleged that it could not recover the loan amount and outstanding interest from Kong.

[10] In the Valuation Report, the Property was valued by the respondent at RM408,000 (forced sale at RM325,000) on the basis that on it were 3 units of double-storey shophouses which were 70% completed.

[11] Although the appellant did not complete foreclosure of the Property at the time of trial, it contended, based upon the second valuation dated 2 August 1990, that a foreclosure would only recoup RM51,000 as the Property was a vacant plot of land.

[12] On this basis, the appellant contended that the respondent was liable to the appellant for negligence.

[13] The learned High Court Judge found the respondent liable to the appellant for negligence. On the evidence submitted at the trial the amount outstanding from Kong to the appellant as at 20 September 1999 was RM445,585.10. This is the quantum of damages awarded to the appellant by the High Court as special damages.

[14] Dissatisfied with the above decision, the respondent appealed to the Court of Appeal. The Court of Appeal decided that there was no duty of care owed by the respondent to the appellant. Thus the Court of Appeal allowed the respondent's appeal. Hence the present appeal before us.

[15] The Federal Court on 5 February 2007 granted the appellant leave to appeal on the following questions of law:

(a) Whether the 'open-ended approach' recognised and adopted by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 regarding a claim for pure economic loss due to negligence should be equally applicable to determine the existence of duty of care in a claim for pure economic loss arising from negligent mis-statement from a professional advisor to a third party?

(b) If the answer to (a) is in the negative, whether the 'assumption of responsibility' test and/or the 'three-fold test' discussed in the case of *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank plc* [2006] UKHL 28 which were adopted by the Court of Appeal in this matter, are the correct tests and applicable law in Malaysia to determine the existence of duty of care from a professional advisor to a third party arising from negligent mis-statement?

[16] Before us, learned counsel for the appellant contended that the correct test for a claim for pure economic loss arising from negligent mis-statement as in this appeal would be the test as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 (*Ampang Jaya*'s case). There the Federal Court preferred 'the open-ended approach' against the 'categorisation approach' which was an approach similar to that adopted by the Court of Appeal in this appeal.

[17] The Federal Court also accepted the approach adopted by the Singapore Court of Appeal in the case of *RSP Architects Planners & Engineers v. Management Corporation* Strata Title No. 1075 [1999] 2 SLR 449. The Federal Court further reiterated that in determining whether the scope of duty of care in the circumstance of the case is such as to embrace damages of the kind suffered by the plaintiff, additional factors such as public policy and local circumstance must be considered.

[18] Under the 'open-ended approach', where the facts of a particular case do not come within a recognised category of liability, a court could go further to look at the facts closely to determine if the duty of care should nevertheless be owed by the defendant to the plaintiff.

[19] Learned counsel further contended that although the Federal Court in the *Ampang Jaya*'s case was dealing with a claim for negligence, a similar approach should be adopted for claim for negligent mis-statement. The test adopted by the Court of Appeal here is clearly contrary to the approach taken by the Federal Court in *Ampang Jaya*'s case.

[20] In opposing the appeal, learned counsel for the respondent argued that the test adopted by the Court of Appeal in determining whether a duty of care exists between the respondent

(valuer) and the appellant (bank) was correct and in keeping with the principles and tests set out by the Federal Court in *Ampang Jaya*'s case.

[21] On the particular facts and circumstances of this case, the Court of Appeal found that the respondent does not owe a duty of care to the appellant.

[22] In attempting to answer the questions posed it is pertinent for us to refer to the approach adopted by the Court of Appeal in the instant appeal.

[23] After quoting extensive passages from the speeches of the Law Lords in *Her Majesty's Commissisoners of Customs and Excise v. Barclays Bank Plc* [2006] 4 All ER 256 (*Barclay's Bank* case) the Court of Appeal made the following observations (at paras 10-13 Vol. 1 AR pp. 51-54):

(a) The ultimate question in determining the existence of a duty of care in cases of pure economic loss is essentially fact sensitive. This means that a careful examination of the facts and circumstances of each case is required before deciding whether to impose a duty of care on the defendant. (Para 10).

This is what the Court of Appeal said:

> Whilst there are several useful tests, indicia or guidelines to ascertain whether a duty of care exists in given circumstances, the ultimate question whether a duty of care should be placed in a particular case is essentially fact sensitive (see, *Arab-Malaysian Finance Bhd v. Steven Phoa* [2003] 1 MLJ 567 where this Court made the same finding).

(b) A useful guide in reaching that determination is to ask whether there was an assumption of responsibility. This is an objective test to decide whether the defendant assumed responsibility to the plaintiff about the accuracy of his statement. (Para 11).

(c) Another test is to see if the case under consideration is close to a decided case in which a duty was found to exist. The closer the facts are to such a case, the more likely is there to be a finding of a duty. The further the facts are from a similar decided case, the less likely the court will find a duty of care. (Para 11).

(d) By agreement of counsel on both sides *Smith v. Eric Bush* [1990] 1 AC 831 was the authority closest to the present facts. This was also a case of negligent mis-statement by a surveyor engaged by a building society to inspect and value a home. The plaintiff relied on the report in deciding to purchase the house. Because of the surveyor's negligence, the plaintiff suffered financial loss. Critical in the finding of a duty of care was the fact that the surveyor knew that the plaintiff would rely on its report without obtaining independent advice and that in the circumstances of the transaction it was good public policy to establish a duty of care. (Para 12).

(e) The facts of the present appeal while similarly dealing with the reliance of a third party on a professional report negligently prepared was sufficiently distant from *Smith v. Eric Bush (supra)* to conclude that there was no duty of care. (Para 13).

The Court of Appeal opined thus:

> Now look at our facts and compare them with those of *Smith v. Eric S Bush*. Here, the report was not commissioned by the plaintiff. It was commissioned by Tan. But, he was not the true buyer. Kong was the true buyer. And there is not a scintilla of evidence to show that the defendant knew the report it gave Tan would be used by Kong. Next, the plaintiff having seen the report did not want it because it was not addressed to Kong. Again, there is not a jot of evidence to show that the defendant permitted Kong to use the report **after** the plaintiff had rejected it. The facts of the present instance are therefore very far from *Smith v. Eric Bush*. It is therefore fair to conclude that there had been no assumption of responsibility by the defendant. It is also fair to conclude that the proximity and policy conditions of the threefold test have not been satisfied.

[24] From the above observations by the Court of Appeal, we must say, with the greatest of respect to the appellant that the Court of Appeal had adopted the tests laid out by the Federal Court in *Ampang Jaya*'s case. We say so for the following reasons:

(a) In his judgment (at para 13 p. 20 of the report) in the *Ampang Jaya*'s case, Steve Shim CJ (Sabah & Sarawak) (as he then was) had this to say:

> Having had the benefit of reading the various authorities on this subject, I am more inclined to accept the positions taken by the courts in Australia and Singapore. In adopting the sentiments and observations expressed by the Singapore Court of Appeal in *PT Bumi International Tankers (supra)*, I would also endorse the view that caution should be exercised in extending the principle in *Donoghue v. Stevensen* to new situations. Much would depend on the facts and circumstances of each case in determining the existence or otherwise of a duty of care.

(b) the learned Chief Judge also acknowledged that the general duty of care in all negligence claims, including claims for pure economic loss is the three-fold test laid out in *Caparo Industries PLC v. Dickman* [1990] 2 AC 605. (See pp. 17H-18G).

(c) That following *Caparo*, a dual approach has developed. The "categorisation" and the "open-ended" approach. In the first instance, the issue of liability is dealt with according to established or recognised categories of duties of care. In novel cases, ie, where the issue has not been decided previously, the courts can go further to determine if the facts admit to a duty of care.

(d) It should be borne in mind that the learned Chief Judge in dealing with the dual approach held at pp. 19 and 20, that they were not mutually exclusive approaches and it is possible for overlap between the two. The same sentiment was expressed in the judgment of Abdul Hamid Mohamad FCJ (as he then was) at p. 42 para 65.

(e) Further, while he expressed his inclination towards the "open-ended" approach, the learned Chief Judge specifically endorsed the conservative or cautious approach to a forward movement adopted by the Singapore Court of Appeal in *Man B & W Diesel SE Asia Ptd & Anor v. PT Bumi International Tankers & another appeal* [2004] 2 SLR 300 *(PT Bumi)*.

(f) It is important to note that PT Bumi went to great lengths to distinguish and high-light the particular facts in the case of RSP Architects *Planners & Engineers v. Ocean Front Pte Ltd* [1996] 1 SLR 113 *(Ocean Front)* which recognised negligence for pure economic loss and to advise "extreme caution" in extending the Donoghue principle or the decision in *Ocean Front.*

[25] From the above analysis, it can be seen that the principles laid out in the *Ampang Jaya*'s case were applied by the Court of Appeal. If they were not expressly adopted, this was because the judgment was not published at the time the appeal was argued in the Court of Appeal. Suffice to say, the Court of Appeal did nothing more than apply those established tests.

[26] Similarly, the decision of the House of Lords in *Barclays Bank* case *(supra)* creates no new law. In our respectful view, it merely consolidates the learning in this vexed area and sets it out comprehensively. At p. 260 para 4 of the speech of Bingham LJ we find the very tests laid out by this Honourable Court in *Ampang Jaya*'s case.

[27] The so-called open-ended approach is also recognised in *Barclays Bank* case. This is the same cautious approach to extending new areas of liability by careful increments adopted by *PT Bumi*, which was endorsed by this Honourable Court.

[28] Referring to the five general observations in the speech of Bingham LJ they are just that – observations arising from a review of the established cases (pp. 261-263). They were not intended to create new law. The first two observations deal with the "assumption of responsibility" test – what it means and how it is to be applied. The third observation is in relation to the three-fold *Caparo* test and how this relates to a novel situation. Here the observation is imprecise labelling can make it difficult to find if a duty of care exists in a novel situation. The cautionary words in *Caparo* and the trend towards categorization are repeated. The fourth observation is that the incremental approach is helpful when used in combination with established principle. The fifth observation is the same call made in *Ampang Jaya*'s case – that the detailed circumstances of the particular case and the particular relationship between the parties generally leads to the correct finding on the existence or not of a duty.

[29] The fifth observation, in our opinion, holds the key to this area of law. The ultimate question is whether the detailed facts and circumstances of the case support the finding of a duty of care. The same observation is found in *Ampang Jaya*'s case and it is also found in the decision of the Court of Appeal. Merely setting out the observations as has been done in the *Barclay's Bank* case has created no new law. It simply clarifies what the courts have been consistently saying.

[30] Regardless of whether we apply the categorization test or simply general principle of *stare decisis*, the decision of the House of Lords in *Smith v. Eric Bush (supra)* is on either view highly persuasive. It deals with facts which are very similar and with principles which are directly applicable to the facts of this appeal. In fact, in the decision, obiter comments were made regarding the duty of a valuer to a third party who relies on the report.

[31] The facts are succinctly set out at p. 843 of the report and the relevant findings on the duty of care appear at pp. 844-847. The House of Lords found that the duty of care existed between the valuer and the plaintiff purchaser because the valuer had assumed responsibility knowing that the valuation fee had been paid by the plaintiff and knowing that the valuation would probably be relied on by the plaintiff to decide on whether or not to buy the house. As can be seen in that case there was actual knowledge of the plaintiff and of his reliance on the report.

[32] Now, reverting to the facts of the instant appeal, there is no evidence to suggest that the respondent knew or ought to have known that the valuation was to be used or relied on by the appellant. The following are our reasons:

(a) The report was addressed to Tan and not to the appellant (Vol. 2 AR p. 328).

(b) Tan was not the owner of the property. The owner was Lim. The borrower was Kong who wanted the loan and had asked Tan to obtain the report from the respondent (Vol. 2 AR pp. 181-182). Already, we can see that there are three levels of individuals between the respondent and the appellant ie, Tan who is asked to procure the valuation, Lim, the landowner who provides his title as security and Kong the beneficiary of the loan.

(c) Lim and Tan took the respondent's valuer to the site and identified the property to him. This is important as it is clear that Tan and Lim had identified a property which did not belong to them. They identified three units of substantially completed shophouses, when in fact (as it subsequently transpired) the land was vacant and there was no construction on it (Vol. 2 AR pp. 182-183). This is significant because if there was any duty owed to Tan, Lim or Kong, it was discharged by valuing the property identified by them. Clearly there is no breach to Tan, Lim or Kong.

(d) From the evidence it appears that the report was rejected by the appellant as it was not addressed to Kong, the borrower. Tan was asked to have it corrected. He says that he met with one Teoh from the respondent company who assured him that this would be "alright" – but this evidence is self-serving and unsupported by documentary evidence or by the appellant. The fact is that the report was always addressed to Tan alone and there were no amendments made (Vol. 2 AR pp. 183-184). The evidence of the appellant's expert that in their practice the report is confidential to the addressee is also relevant (Vol. 2 AR p. 176).

(e) Further, one of the appellant's officers confirmed that there was no communication between the appellant and the respondent until 10 August 1990 (Vol. 2 AR p. 162). As a matter of fact, this officer could not even confirm that the valuation report was in the loan application file or how it came to the appellant's hands.

(f) Another officer of the appellant contradicted this and testified that there was communication but clearly his evidence was hearsay and inadmissible (Vol. 2 AR p. 197). Thus it is unclear whether there was any reliance on the report.

(g) The letters of offer by the appellant do not require a valuation report to be produced. In fact they require the appellant to satisfy itself of the progress of the construction (Vol. 2 AR pp. 322-325).

(h) The appellant did in fact carry out its own inspection at the site and confirmed that the buildings were 100% completed before disbursing the loan (Vol. 2 AR pp. 147 and 367).

(i) The original letter of offer was issued on 17 October 1985. This was cancelled. A fresh offer was issued on 2 April 1986 which was accepted. At this point of time the report was one year and three months old (issued on 21 January 1985). A valuer called as an expert by the appellant testified that it was unreasonable for the appellant to have relied on a report which was more than one year old (Vol. 2 AR pp. 322, 325, 152, 176).

(j) The report carried a clear disclaimer under the heading "Limiting Conditions", (Vol. 2 AR p. 340). The appellant's expert witness also testified that the industry practice requires strict adherence to these conditions (Vol. 2 AR p. 176).

[33] For the reasons already advanced above, we respectfully say that the appellant did not in fact rely on the valuation report in granting the loan to Kong.

[34] In our respectful view, the situation is akin to the professional referred to by Griffiths LJ in *Smith v. Eric Bush (supra)* who ought not on policy grounds to be held to owe a duty to persons unknown.

At p. 865 of the report His Lordship observed:

> It would impose an intolerable burden upon those who give advice in a professional or commercial contract if they were to owe a duty not only to whom they give the advice but to any other person who might choose to act upon it.

[35] In the final analysis, we readily appreciate that the Court of Appeal acted precisely on the same tests adopted by this Honourable Court in *Ampang Jaya*'s case. The Court of Appeal basically holds the view that each case must be decided on its particular facts to establish if a duty of care exists.

[36] On that finding we answer both the questions posed to us in the affirmative and order that this appeal be dismissed with costs. The deposit is to go to the respondent to account of taxed costs.

[37] My learned brothers Arifin Zakaria and Hashim Yusoff, FCJJ have read this judgment in draft and have expressed their agreement with it.